BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NANCY L. KEPFORD Claimant VS. **LABETTE COUNTY MEDICAL CLINIC** Respondent AND **LM INSURANCE CORP.** Insurance Carrier	)	Docket No. 1,039,240

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 23, 2009, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Kala Spigarelli, of Pittsburg, Kansas, appeared for claimant. John M. Graham, Jr., of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant made a timely written claim for benefits for her work-related accident of March 2007 and ordered respondent to pay her medical bills from November 15, 2007, through May 28, 2008, as listed in claimant's Exhibit 2 to the May 28, 2008, preliminary hearing transcript.

The record on appeal consists of the transcript of the March 18, 2009, Preliminary Hearing and the exhibits, and the transcript of the May 28, 2008, preliminary hearing transcript and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether claimant sustained an accidental injury that arose out of and in the course of her employment, whether she provided respondent with timely notice of her alleged injury, whether she made a timely written claim, and whether she proved that the medical bills from November 15, 2007, through May 28, 2008, as listed

in claimant's Exhibit 2 to the May 28, 2008, preliminary hearing transcript, were related to her alleged work-related injury.

Claimant requests that the Board affirm the ALJ's findings that she gave timely notice and made a timely written claim of an injury she sustained while in the course of her employment. Claimant further requests that the Board affirm the ALJ's order that respondent pay her medical expenses from November 15, 2007, through May 28, 2008, as listed in claimant's Exhibit 2 to the May 28, 2008, preliminary hearing transcript.

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury that arose out of and in the course of her employment with respondent?

(2) Did claimant give respondent timely notice of her alleged injury?

(3) Did claimant make a timely written claim?

(4) Did claimant prove that the medical bills ordered paid by respondent are related to claimant's alleged work-related injury?

FINDINGS OF FACT

In 2006, claimant was working as a relief nurse's aide and board secretary for respondent. Her supervisor was Leslie Kirkland. However, claimant seldom saw Ms. Kirkland because of Ms. Kirkland's responsibilities as director over all respondent's clinics. Claimant worked daily with Demie Ahlquist, a physician's assistant, and in Ms. Kirkland's absence, Ms. Ahlquist "pretty much ran the office."[1] Although Ms. Ahlquist was not technically her direct supervisor, claimant considered her to be a supervisor because she could overrule or change claimant's decisions. She testified that she and Ms. Ahlquist spoke about her job duties, and at times Ms. Ahlquist would give her directions. Ms. Ahlquist was on the hiring team when claimant was interviewed, but she did not give her any performance reviews. Claimant had not been disciplined at work by Ms. Ahlquist, although Ms. Kirkland disciplined her one time.

Claimant injured her low back at work in 2006 while she was working as a nurse's aide. She admits that she never reported the 2006 injury to respondent, and she was treated by her personal physician. Although her low back was hurting her, she continued her original job until April 2007, when she resigned the position as a nurse's aide but continued to work for respondent as the office manager. At the time she decided to stop

[1] P.H. Trans. (May 28, 2008) at 24.

working as a nurse's aide, she did not tell anyone at respondent that it was because she was having back problems as a result of a work-related injury.

On or about March 27, 2007, claimant again injured her low back while pushing a cart full of patient charts. She said the cart was so heavy she had her back against a wall and her feet against the cart, and she was pushing it to get it to start rolling. She felt immediate pain in her low back and right leg.

Claimant told Ms. Ahlquist she was hurting and taking a lot of Ibuprofen. Ms. Ahlquist told her not to take so much Ibuprofen. She could not remember if she specifically told Ms. Ahlquist that she hurt her back at work. The next day, she again spoke with Ms. Ahlquist when she called in to work and told her she could hardly move. Ms. Ahlquist set up an appointment for claimant to be seen by Dr. Jain. Claimant saw Dr. Jain the same day, and he sent her back to the office, where she was given a shot of Toradol. After getting the shot, one of respondent's employees drove her to the hospital, where she was admitted. While in the hospital, she was treated by Dr. Neil Goodloe.

Claimant was in the hospital two days, and returned to work the next week. She continued to work for respondent as office manager. Her job required her to move and lift files, and she continued to feel back and leg pain. She continued being treated by Ms. Ahlquist and Dr. Pauls, who also worked for respondent. She testified that she was referred to Dr. Gibbs, who gave her three injections in her back. The injections did not help her, and she was then referred to a neurosurgeon, Dr. Cherylon Yarosh. Claimant had surgery on her low back on November 13, 2007. As of the date of the May 28, 2008, preliminary hearing, claimant was still being treated by Dr. Yarosh and had not been released to return to work.

Claimant admitted that she is not aware of any medical records of her treatment that show that she sustained a work-related injury. None of her off-work slips indicated that she was being taken off work because of a work-related injury.

Claimant submitted the medical bills for the treatment to her low back to her private health insurance carrier. On October 31, 2007, she filled out the paperwork for FMLA leave, which had been provided to her by Christina Sykes, respondent's Human Resources Director. In setting out the details of her medical problem on the paperwork, she stated she "[s]ustained injury to my back in form of herniated disc and tear while working as aide on 2N in 2006[;] further aggravated injury while moving furniture at Erie Clinic early in 2007."[2] Claimant faxed the forms back to Ms. Sykes on November 8, 2007. This was the first time claimant had provided anything in writing to respondent about her work-related injuries.

[2] P.H. Trans. (May 28, 2008), Resp. Ex. 2.

In December 2007, claimant called Ms. Sykes to tell her that she would not be returning to work yet. At that time, Ms. Sykes told her that she had turned the claim in to respondent's workers compensation carrier after noting that the FMLA forms indicated claimant had a work injury. After claimant learned that a workers compensation claim had been made, she realized that her personal health insurance carrier had stopped paying her medical bills. Later, she found out that her health insurance carrier was being reimbursed by her medical providers for some of the bills it had previously paid.

Claimant testified that originally she did not want to turn her claim in to workers compensation because she did not want to lose her job. She did not discuss filing workers compensation forms with anyone at respondent. She does not know if Ms. Ahlquist or any other doctor spoke with anyone in the human resources department about her injury. She did not ask Ms. Ahlquist to report her back condition to the human resources department. At the time she filled out the FMLA forms, she did not formally ask respondent for medical treatment under workers compensation. Claimant made a written claim for benefits on February 25, 2008, and that was the first time she formally requested respondent to provide her with medical treatment for a work injury.

At the May 28, 2008, preliminary hearing, claimant entered as Exhibit 2 a document that she generated showing a list of her medical bills. Claimant testified that she called the offices of the medical providers to get the outstanding balance on the bills, as well as the amount of money that her health insurance carrier had been reimbursed by the medical providers. She said she had stacks of medical bills, but it seemed easier to figure it out by calling the providers.

After the preliminary hearing held May 28, 2008, the ALJ entered an order denying claimant workers compensation benefits "for failure to establish a work related accident and timely written claim."[3] On June 3, 2008, claimant's attorney wrote the ALJ, stating that after the preliminary hearing, she determined that respondent had not filed an Employer's Report of Accident with the Division of Workers Compensation. Because that failure tolled the 200-day limit for filing a written claim to one year, claimant's attorney argued that claimant's written claim of February 25, 2008, was timely because it was made within a year of the date of accident of March 2007.

A second preliminary hearing was held on March 18, 2009. At that hearing, Ms. Sykes testified that she had not been advised that claimant had a work-related injury before receiving the FMLA paperwork on November 8, 2007. She contacted Kathi McKinney, claimant's supervisor in 2006, and Ms. Kirkland, claimant's supervisor at the time of the 2007 incident, and neither had any knowledge of claimant's alleged work-related incidents. After receiving the FMLA paperwork on November 8, 2007, Ms. Sykes filled out a report of accident and forwarded it to respondent's workers compensation

[3] ALJ Order (June 3, 2008).

insurance carrier. She did not send the report to the Division of Workers Compensation (Division) and said that respondent's workers compensation insurance carrier would have done that. She testified that she contacted respondent's insurance carrier after the May 28, 2008, hearing and was told that it had sent the report of accident to the Division. But she did not testify as to when that had been done.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

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[4] K.S.A. 2008 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 44-557 states in part:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.
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> . . . .
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> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for

> compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS AND CONCLUSION

Claimant alleged her accidents "occurred in 2006 then reinjured in March 2007 and continuing each and every day until last day worked on 10-18-07."[9] However, at the March 18, 2009, preliminary hearing, counsel for claimant alleged two specific dates of accident, one in 2006 and one in 2007, rather than a series of accidents.[10] The record fails to prove any work-related aggravation following the alleged incident moving the cart on or about March 27, 2007.

K.S.A. 44-520 requires work-related accidents to be reported to the employer within 10 days. Under some circumstances, that time period can be extended to 75 days. Claimant did not report her alleged March 27, 2007, back injury as work related until November 8, 2007. Although claimant told Ms. Ahlquist of her injury, she did not inform Ms. Ahlquist that her injury was work related. Claimant's medical treatment was not provided under workers compensation. Claimant acknowledged that she never requested that her medical treatment expenses be paid under workers compensation. Instead, claimant submitted her medical bills to her health insurance carrier. Claimant did not tell any health care provider that her back injury was work related.

Claimant failed to provide respondent with timely notice of her alleged work-related accident or accidents. Respondent was under no duty to file an employer's report of accident until it had knowledge of an accident or that an accident was being alleged. Respondent did not know claimant was alleging a work-related accident until claimant gave

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[7] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2008 Supp. 44-555c(k).

[9] Form K-WC E-1, Application for Hearing filed March 14, 2008.

[10] P.H. Trans. (Mar. 18, 2009) at 4.

notice on November 8, 2007. So any failure by respondent to file an employer's report of accident within 28 days of the alleged accident of March 27, 2007, would not extend claimant's time limitations.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated March 23, 2009, is reversed, and benefits are denied.

IT IS SO ORDERED.

Dated this _____ day of May, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
John M. Graham, Jr., Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge